



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

DEC 22 2008

Mr. Neil P. Reiff, Esq.
Sandler, Reiff & Young, PC
300 M Street, SE
Suite 1102
Washington, DC 20003

RE: MUR 5575
Alaska Democratic Party and
Rolando Rivas, in his official
capacity as treasurer

Dear Mr. Reiff:

Based on a complaint filed with the Federal Election Commission on October 20, 2004, and information supplied by your clients, the Alaska Democratic Party and Rolando Rivas, in his official capacity as treasurer ("the Committee"), the Commission, on April 3, 2006, found that there was reason to believe the Committee violated 2 U.S.C. §§ 441a(a)(2)(A), 441a(d), 441a(f) and 441(d)(a) and instituted an investigation of this matter.

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that violations of 2 U.S.C. §§ 441a(a)(2)(A) and 441d(a) have occurred.

The Commission may or may not approve the General Counsel's recommendation. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

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You may also request an oral hearing before the Commission. See Commission's "Procedural Rules for Probable Cause Hearings," 72 Fed. Reg. 64919 (November 19, 2007). Hearings are voluntary, and no adverse inference will be drawn by the Commission based on a respondent's decision not to request such a hearing. Any request for a hearing must be submitted along with your reply brief and must state with specificity why the hearing is being requested and what issues the respondent expects to address. The Commission will notify you within 30 days of your request for a hearing as to whether or not the request has been granted.

A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement.

Should you have any questions, please contact Christine C. Gallagher, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Thomasenia P. Duncan
General Counsel

Enclosure
Brief

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1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2
3 In the Matter of)
4) MUR 5575
5 Alaska Democratic Party and Rolando Rivas,)
6 in his official capacity as treasurer¹)
7

8 **GENERAL COUNSEL'S BRIEF**

9
10 **I. INTRODUCTION**

11 This matter was generated by a complaint filed with the Federal Election Commission by
12 Timothy A. McKeever alleging the Alaska Democratic Party and its treasurer ("ADP") violated
13 the Federal Election Campaign Act of 1971, as amended, ("the Act"). The Commission found
14 reason to believe that ADP violated 2 U.S.C. §§ 441a(a)(2)(A), 441a(d), 441a(f) and 441(d)(a)
15 based on information suggesting that ADP made excessive coordinated contributions to the Tony
16 Knowles for U.S. Senate Committee ("Knowles Committee") by distributing printed materials
17 promoting Knowles or attacking his opponent, which did not appear to fit within the "volunteer
18 materials" exemption of the Act. The ensuing investigation revealed evidence that most of the
19 expenditures ADP claims are covered by the Act's volunteer materials exemption did not satisfy
20 the necessary criteria and were coordinated with the Knowles Committee. In addition, the
21 printed materials not qualifying as exempt activities failed to include adequate disclaimers.
22 2 U.S.C. § 441d(a).

23 Based on the following factual and legal analysis, the General Counsel is prepared to
24 recommend that the Commission find probable cause to believe that the Alaska Democratic
25 Party and Rolando Rivas, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(a)(2)(A)
26 and 441d(a).
27

¹ Joelle Hall served as treasurer of this committee during the time of the activity at issue.

II. FACTUAL AND LEGAL ANALYSIS

Tony Knowles was a 2004 candidate for U.S. Senate from Alaska. From September 1, 2004 through October 28, 2004, ADP produced and distributed communicative materials promoting Knowles or attacking his opponent that cost at least \$944,331, all of which ADP originally disclosed in its FEC disclosure reports as disbursements exempt from the Act's definitions of "contribution" and "expenditure."

Because the violations in this matter stem from excessive coordinated contributions by ADP to the Knowles Committee, and the failure to comply with the Act's disclaimer requirements, it is necessary to show (1) the volume of costs incurred by ADP that were not, in fact, exempt from the Act's definitions of "contribution" and "expenditure," (2) that ADP and the Knowles Committee coordinated the non-exempt communications for which ADP paid, (3) that the resulting in-kind contributions exceeded the Act's limitations on what ADP could contribute to the Knowles Committee during the relevant time period, and (4) that the non-exempt materials required disclaimers. We address these issues below.

A. In Excess of \$600,000 of ADP's Disbursements Were Not Eligible for the Volunteer Materials Exemption

The Act limits the amount that a state party committee may contribute to or spend on behalf of a federal candidate. 2 U.S.C. §§ 441a(a)(2)(A), 441a(d). However, the terms "contribution" and "expenditure" are defined by the Act and the Commission's regulations to exclude the payment, by a state committee of a political party, of the costs of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids, and yard signs) used by such committee in connection with volunteer activities on behalf of nominees of such party,

1 provided among other things, that the materials are not purchased with funds donated by the
2 national committee to such state committee for the purchase of such materials. 2 U.S.C.
3 §§ 431(8)(B)(ix) and (9)(B)(viii), 11 C.F.R. §§ 100.87(g) and 100.147(g). If the expenses are
4 not exempted from the "contribution" and "expenditure" definitions, then the expenses are
5 subject to the Act's limitations. 2 U.S.C. §§ 441a(a)(2)(A) and 441a(d).

6 During the 2004 election cycle, ADP used \$675,926 in funds transferred from the
7 Democratic Senatorial Campaign Committee ("DSCC"), a national party committee, for
8 disbursements for communicative materials benefiting the Knowles Committee that were
9 originally disclosed by ADP as exempt. This conclusion is based on our review of 16 targeted
10 disbursements, totaling approximately \$944,331, made by ADP to four vendors: AMS
11 Communications, Inc., The Stake Shop, Super Signs, Ltd., and Color Art Printing during the
12 period of September 1, 2004 through October 28, 2004.² Applying a conservative "modified
13 FiFo" (First in-First out) analysis based on the dates of receipts and disbursements disclosed on
14 ADP's FEC reports, we calculated the funds available on the date of each of the targeted
15 disbursements to determine whether sufficient non-national party funds were available in ADP's
16 federal account to (partially or entirely) cover the disbursement in question.³ That calculation
17 showed that \$675,926 of ADP's disbursements for purportedly exempt materials were actually

² A targeted disbursement means a payment claimed by ADP to be for "exempt" materials.

³ The "modified FiFo" analysis utilizes the "standard FiFo" approach to establish the application of funds until the date of the disbursement(s) in question. On that date, the targeted disbursement is deemed to be paid for, in whole or in part, with any non-national party funds available in ADP's federal account. The disbursement would be considered to be partially or entirely paid for with national party funds only if ADP had exhausted its supply of non-national party funds on the day the disbursement was reported as being made. This analysis, used by the Commission in MUR 3248 (New York State Democratic Committee), is more beneficial to the Committee than the "standard FiFo" analysis. Under the "standard FiFo" analysis, the assumption is not made that all non-national party funds are first exhausted to pay a targeted disbursement. Applying a "standard FiFo" analysis, the amount of purportedly exempt disbursements paid for with national party funds in this matter would be \$849,769.

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1 paid with national party committee funds.⁴ Therefore, these disbursements were not eligible for
2 the volunteer materials exemption and were subject to the Act's limitations.⁵

3 **B. ADP Coordinated the Non-Exempt Disbursements with the Knowles Committee**

4 A communication is "coordinated" if it meets a three prong test: (1) payment by a
5 political party or its agent; (2) satisfaction of at least one of the four content standards set forth at
6 11 C.F.R. § 109.37(a)(2); and (3) satisfaction at least one of the five conduct standards set forth
7 in 11 C.F.R. § 109.21(d). *See* 11 C.F.R. § 109.37(a). A payment for a communication satisfying
8 all three prongs is either an in-kind contribution to, or a "coordinated party expenditure" on
9 behalf of, the candidate with whom it was coordinated. 11 C.F.R. § 109.37(b). Here, the non-
10 exempt disbursements meet all three prongs.

11 The first prong of the coordinated communication analysis is satisfied because ADP paid
12 for all of the materials at issue. The second prong, the content standard, is satisfied because the
13 materials qualify as "public communications" under 11 C.F.R. § 100.26, clearly reference Tony

⁵ Our investigation also uncovered evidence that not all of the purportedly exempt communications involved sufficient volunteer activity to qualify for the exemption, even if the funds to purchase them had not come from the DSCC. For example, according to ADP the materials that were not mailed "would have been distributed through door-to-door canvass[ing] and at community events, meeting, etc., by a combination of paid and volunteer labor." ADP Subpoena Response to Question 8.f. For materials that were mailed, ADP volunteers operated directly out of the mail facilities of North Mail, Inc. ("North Mail"), a mail vending company based in Anchorage. While the evidence shows that volunteers printed addresses on the mailers and sorted and bundled them, it appears that a North Mail employee delivered them in a company truck to the U.S. Post Office. *See* MURs 5824/5825 (Pennsylvania Democratic State Committee) and MUR 5837 (Missouri Democratic State Committee) (volunteer involvement in delivering mailers to the Post Office is a factor in determining eligibility for the volunteer materials exemption). Given that we were unable to quantify the amount of non-volunteer activity, and the evidence that \$675,926 of the materials were paid for with funds from the DSCC, it is not necessary to rely on the non-volunteer activity to disqualify the materials from the exemption.

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1 Knowles or his opponent, and were distributed within 90 days of the general election, all to
2 residents of Alaska. See 11 C.F.R. § 109.37(a)(2)(iii)(A)-(B). Specifically, based on invoices
3 listing the quantity of each separate mailing, these materials would be classified as "mass
4 mailings" as defined at 11 C.F.R. § 100.27, which is one of the specifically enumerated types of
5 "public communications." See 11 C.F.R. § 100.26. In addition, the other non-exempt printed
6 materials constitute forms of "general public political advertising" within the meaning of 11
7 C.F.R. § 110.11(c)(2)(i)(including "flyers" and "signs" in a listing of printed public
8 communications requiring disclaimers).

9 Further, of the printed materials paid for by ADP, all but one clearly identified
10 Tony Knowles and/or his opponent, Lisa Murkowski. See footnote 6, *infra*. These materials
11 typically included statements favorable to Knowles (e.g., "Tony Knowles – A Strong,
12 Independent and Effective Leader") or critical of Murkowski (e.g., "Lisa Murkowski Has
13 Turned Her Back On Those Who Served"). Based on dates indicated on the materials and dates
14 included in vendor invoices and ADP's disclosure reports, the available evidence indicates that
15 these materials were distributed in the two months preceding the general election.

16 The third prong of the coordination analysis, the conduct standard, is satisfied here
17 because the evidence shows that the Knowles Committee was intimately involved in decisions
18 concerning the content and other aspects of the materials at issue. See 11 C.F.R. § 109.21(d)(1)-
19 (3) Evidence obtained during the investigation shows that James Messina, who served as
20 Campaign Director for the Knowles campaign, interacted directly with the primary mail vendor
21 and with other Knowles staff in the design and distribution of the materials at issue. Messina
22 was employed simultaneously by ADP and the Knowles Committee from June 2004 through the
23 November election. According to the Knowles Committee:

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1 Mr. Messina's role within the Knowles campaign focused on oversight
2 of communications strategy. He also served as the Knowles campaign's
3 main liaison to the ADP coordinated campaign and its exempt activities
4 program. He reported to both [Knowles Campaign Manager] Leslie
5 Ridle and [ADP Executive Director] Bridget Gallagher. His salary was
6 allocated on a 50% basis between the Knowles campaign and the ADP.

7
8 Knowles Subpoena Response to Question 1. The Knowles Committee further acknowledged
9 that it "provided information concerning Tony Knowles that was used in" ADP's materials, and
10 that Messina and Knowles Campaign Manager Leslie Ridle reviewed the materials "for accuracy
11 about Tony Knowles' record." *Id.*, Response to Question 4.

12 According to Messina, after determining what issue should be covered in a particular
13 piece, he would ask the Knowles Committee research staff for any information they had on the
14 issue. The head of Knowles' research staff would typically work up a fact sheet for Messina,
15 who then created a preliminary draft of the piece that was fact-checked by the research staff.
16 After Messina worked with the main vendor to design the graphics and format the language, the
17 piece was generally reviewed by Knowles' campaign manager, Leslie Ridle, who sometimes
18 made content suggestions. The vendor would then draft a final version and send it to a printing
19 vendor located in Alaska. Messina would provide mailing lists for each piece to the printing
20 vendor after discussing with Leslie Ridle who should receive that particular piece.

21 The level of involvement of the Knowles Committee concerning the content, style and
22 audience for the materials, clearly satisfies the "material involvement" conduct standard set forth
23 at 11 C.F.R. § 109.21(d)(2) (candidate or authorized committee is involved in decisions
24 regarding a printed communication's content, intended audience, means or mode, specific media
25 outlet, the timing or frequency, or size and prominence of the communication). Consequently,
26 payments made by ADP for these materials constitute coordinated party expenditures made in
27 connection with the Knowles Committee that were subject to applicable contribution limitations.

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1 See 2 U.S.C. §§ 441a(a)(2)(A) and 441a(d). As set forth below, ADP's payments exceed these
2 limits.

3 **C. The Coordinated Party Expenditures Exceeded the Act's Limits**

4 Pursuant to the party expenditure limits set forth at 2 U.S.C. § 441a(d), ADP's maximum
5 general election coordinated expenditure limit on behalf of Knowles was \$74,620 in 2004.

6 Based on its disclosure reports, ADP reached that limit on or around July 30, 2004. During the
7 period from July 30 through September 30, 2004, ADP reported an additional \$59,541 in
8 coordinated expenditures on behalf of Knowles. Under 11 C.F.R. § 109.33(a), ADP could make
9 additional coordinated expenditures as long as it received proper assignment from the national
10 party committee. During the investigation ADP produced three 2004 letters from the DSCC
11 showing that it was authorized to spend the amount in question (information indicates that the
12 DSCC spent the remainder, thereby exhausting the combined state/national party limit).
13

14 ADP reported \$1,713 in general election contributions to the Knowles Committee, \$3,287
15 short of its \$5,000 limit. See 2 U.S.C. § 441a(a)(2)(A). Accordingly, any further coordinated
16 expenditures by ADP that exceeded \$3,287 would constitute excessive in-kind contributions by
17 ADP on behalf of the Knowles Committee. See 2 U.S.C. § 441a(a)(7)(B)(i) (contributions to a
18 candidate include expenditures coordinated by any person with that candidate, *i.e.*, "in
19 cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his
20 authorized political committees or their agents").

21 As shown above, applying the conservative "modified FiFo" analysis, the coordinated
22 expenditure amount is \$675,926. Because all the materials included in that figure identified
23 Tony Knowles and/or his opponent and no other candidates (none of these items contained
24 references to any party or generic references to party candidates), the expenditures are entirely

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1 attributable to Knowles.⁶ See 11 C.F.R. § 106.1(a) (attribution for publications based on
2 "proportion of space or time devoted to each candidate as compared to the total space or time
3 devoted to all candidates"). Since ADP had exhausted all but \$3,287 of its combined
4 contribution/coordinated expenditure limit for the general election, ADP made, and the Knowles
5 Committee received, excessive in-kind contributions of \$672,639 (\$675,926 - \$3,287).

6 **D. The Mailed Mailers Lacked Appropriate Disclaimers**

7 The Act and Commission regulations require that "all public communications" made by a
8 political committee include a disclaimer. 2 U.S.C. § 441d(a) and 11 C.F.R. § 110.11(a)(1). If
9 the communication is authorized by a candidate, his or her authorized committee or an agent of
10 either, but paid for by any other person, then the disclaimer must clearly identify who paid for
11 and who authorized the communication. 2 U.S.C. § 441d(a)(2) and 11 C.F.R. § 110.11(b)(2).
12 However, disclaimers on communications qualifying as exempt activity need not include a
13 statement as to whether the communication is authorized by a candidate, his or her agent, or
14 authorized committee. 11 C.F.R. § 110.11(e).

15 The materials at issue required appropriate disclaimers, because they did not qualify as
16 exempt activities and were coordinated with the Knowles Committee. With the exception of two
17 door hangers, none of the materials uncovered during the investigation stated whether they were
18 authorized by a candidate, authorized committee or agent. Moreover, most of the materials at
19 issue expressly advocated the election of Tony Knowles or the defeat of his opponent, Lisa
20 Murkowski, and would satisfy the express advocacy test at 11 C.F.R. § 100.22(a), because they
21 contain "magic words" (e.g., "Knowles – U.S. Senate") or words which in context have no other
22 reasonable meaning than to urge the election of Knowles or the defeat of his opponent (e.g.,

⁶ We have removed from the calculations in the "modified FIFO" analysis the cost of a mailer that did not reference Knowles and/or his opponent.

"Ten Reasons to Tell Murkowski No! On Election Day!"). See 11 C.F.R. § 110.11(a)(2).
However, the materials at issue failed to meet the general content requirements for disclaimers,
because although they contained disclaimers identifying who paid for the communications, they
failed to also identify that they were authorized by the Knowles Committee. 2 U.S.C.
§ 441d(a)(2) and 11 C.F.R. § 110.11(b)(2).

Therefore, the General Counsel is prepared to recommend that the Commission find
probable cause to believe the Alaska Democratic Party and Rolando Rivas, in his official
capacity as treasurer violated 2 U.S.C. §§ 441a(a)(2)(A) and 441d(a).

III. GENERAL COUNSEL'S RECOMMENDATION

Find probable cause to believe that the Alaska Democratic Party and Rolando Rivas, in
his official capacity as treasurer violated 2 U.S.C. §§ 441a(a)(2)(A) and 441d(a).

12/19/2008

Date

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